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No. 85-1629

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, etc., *et al.*,

Petitioners,

v.

JAMES HOWARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OSCAR W. ADAMS, III
Suite 729
Brown Marx Tower
2000 First Avenue, North
Birmingham, Alabama 35203
(205) 324-4445

Counsel for Respondents

ERIC SCHNAPPER
Of Counsel

Table of Contents

	Page
Statement of the Case	1
Reasons for Denying the Writ . . .	8
Conclusion	19

Table of Authorities

Case:

Terrell v. United States Pipe & Foundary Co., 644 F.2d 1112 (5th Cir. 1981) . .	8,9,10,11
Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974)	12
Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974)	12
Title VII, Civil Rights Act of 1964	6
§ 703(c)(3), Civil Rights Act of 1964	13
42 U.S.C. § 1981	6

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Statement of the Case

This is an employment discrimination action arising out of allegedly racially discriminatory practices at the Tarrant

City, Alabama, plant of the Clow Corporation, a manufacturer of industrial pipe and fittings. Named as defendants were Clow, Local 100 of the International Molders and Allied Workers Union, and the International Molders and Allied Workers Union. The union was the collective bargaining representative of the hourly employees at the Tarrant City plant.

This action was filed in September, 1977. In 1980 the Tarrant City plant closed, rendering moot all claims except those for monetary relief. In 1982 the company entered into a consent decree providing monetary relief to the class members; the union, however, declined to enter into a similar settlement. Respondents' claims against the union were tried in January, 1983.

Prior to 1965 the union had engaged in concerted action with the employer to exclude blacks from any of the well paid skilled and semi-skilled positions at the plant. (Pet. App. 24a, 27a, 28a) Blacks were expressly forbidden to bid on these white jobs; indeed, for years the union opposed even the creation of any bid system for the black jobs. (Pet. App.30a) The union insisted that no black worker, whatever his or her position, be permitted to use tools of any kind, and intervened on behalf of whites when several blacks were discovered to be using hammers and pliers on the job. (Pet. App. 29a)

When Title VII was adopted representatives of the company and union met to discuss joint action to "temporiz[e]" the

effects of the statute.[1] Shortly thereafter the company announced that, although blacks could bid on the formerly white jobs, any person seeking promotion to most of those positions would have to pass a newly adopted test. (Pet. App. 37a) The test measured an employee's familiarity with machinery and tools, knowledge which the union had for decades successfully demanded be kept from its black members. The district court found that this new test was successful in preventing the movement of most black employees into the positions at issue. (Pet. App. 39a) Almost 90% of all blacks who took the test failed it; whites passed the test at a rate 5 times as high as blacks. (Id.)

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[1] Minutes of meeting of May 12, 1965, p. 8.

In 1970 two blacks filed a grievance alleging that the test violated the anti-discrimination provisions of the collective bargaining agreement. The union refused without explanation to process the grievance, and reached an agreement with the company that the test was permissible under the union's contract. (Pet. App. 38a-39a). On repeated occasion blacks objected either to the union, or the union's chief contract negotiator, about the test, and the negotiator promised to "look into" the problem. (Pet. App. 58a; Tr. 492). The district court found, however, that neither that negotiator nor any other union representative during contract negotiations ever proposed that the test be ended or even reconsidered (Pet. App. 58a). The employer's willingness to accede to such a proposal was starkly

demonstrated when the company abandoned use of the test in 1977 immediately after the filing of the instant action. (Pet. App. 58a).

Respondent's complaint alleged, inter alia, that the union had violated Title VII and 42 U.S.C. § 1981 by knowingly acquiescing in the continued use of the allegedly illegal test. (Pet. App. 47a). The District Court recognized that a union was obligated to use reasonable efforts to eliminate a discriminatory practice if the union itself was "involved in [that] Title VII violation" (Pet. App. 51a), and held that the union here had such an obligation to seek an end to the illegal test. (Pet. App. 57a-59a). The District Court found that the union had made no effort whatever to meet that obligation, and was thus liable to the respondents. (Pet.

App. 58a-59a). Because of these factual conclusions the District Court did not find it necessary to decide whether the union's continued acquiescence in the test was racially motivated. (Pet. App. 58a n.19, 76a n.1) Following a subsequent magistrate's report, the district court concluded that no individual class members were entitled to any monetary relief. (Pet. App. 76a-77a)

On appeal the union expressly acknowledged that it would have been obligated to seek elimination of the test if it had ever agreed to or acquiesced in the use of that test. The union insisted, however, that no such agreement or acquiescence had in fact occurred. The court of appeals affirmed that finding of the district court that such an obligation existed under the particular circumstances of this case. The court of appeals

reversed the denial of monetary relief, and remanded the case for the fashioning of an appropriate remedy.

REASONS FOR DENYING THE WRIT

The decisions below do not, as petitioners suggest, announce or apply any rule imposing vicarious liability on an innocent union that merely fails to prevent employer discrimination. The actual holding of the District Court is as follows:

> Whether a party involved in an established Title VII violation may be excused from liability . . . turns upon whether that party has proved to the full satisfaction of the courts that it has taken every reasonable step to bring employment practices into compliance with the law.[2]

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[2] Pet. App. 51a (emphasis added and omitted), quoting Terrell v. United States Pipe & Foundary Co., 644 F.2d 1112, 1129 (5th Cir. 1981).

This language is taken verbatim from the earlier Fifth Circuit standard in Terrell v. United States Pipe & Foundary, 644 F.2d 1112, 1129 (5th Cir. 1981), and it was the Terrell standard which the Eleventh Circuit expressly applied in this case. (Pet. App. 2a-31, 13a). Terrell and its progeny are concerned, not with any affirmative duties of innocent unions, but with the legal obligations of unions that agreed to, acquiesced in, or otherwise caused a violation of Title VII itself.

Petitioners did not question below,[3]

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[3] Petition for Rehearing, pp. 3-6 ("[T]he Molders accept the 'Terrell test' with respect to those employment practices as to which the Union actively participates in creating . . . ."); Reply Brief of Cross-Appellants, 8 (approving "[t]he 'all reasonable means' test of such cases as Terrell v. U.S. Pipe . . ."); Brief of Defendants-Appellees, p. 51 ("A union need not successfully end a discriminatory practice to avoid liability -- it need only oppose the practice.")

and do not seek review by this Court, of the actual legal principle announced in Terrell and applied in this case -- that a union involved in unlawful discrimination must take affirmative steps to bring that discrimination to an end. Nor do petitioners suggest that there is any disagreement among the circuits about that principle. For over a generation there has existed among the lower courts, and within this Court, a unanimous agreement that a defendant must take action to disestablish discriminatory practices for which it bears significant responsibility. Terrell merely applies to Title VII that universal and uniformly accepted rule.

In some instances where a union bears partial responsibility for a discriminatory practice, the union may be unable to end that practice without the concurrence of the employer; rather than

impose strict liability in such a situation, Terrell requires only that a union do whatever is possible to alter the illegal practice. The "all reasonable effort" standard in Terrell thus marks a limitation on a defendant union's legal obligation. That standard was adopted in Terrell itself at the behest of the union defendant in that case, and the petitioners in the instant case expressly endorsed that standard in the court below.[4]

When a Title VII plaintiff alleges that a union unlawfully "caused" discrimination by an employer, there will almost invariably be difficult factual issues regarding the extent to which the union may have agreed to, deliberately acquiesced in, aggravated, or perhaps

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[4] See n. 3, supra.

promoted the practice at issue. The appellate decisions which petitioners assert conflict with the decision below in reality turned on just such factual issues. In Thornton v. East Texas Motor Freight, 497 F.2d 416, 425 (6th Cir. 1974), the defendant union local had formally requested the employer to end the illegal practice; in Williams v. General Foods Corp., 492 F.2d 399, 405 (7th Cir. 1974), the union had aggressively pursued a grievance challenging the unlawful practice. Under those circumstances the courts of appeals in those cases reasonably concluded that the respective unions had not "acquiesced" in or agreed to the disputed practices. See 497 F.2d at 425. Neither the sixth or seventh circuit disputed the obligation

of a union to take steps to end discriminatory practices for which it bore responsibility.

The instant case presented an essentially factual dispute that is typical of section 703(c)(3) claims. At trial respondents offered probative evidence that the union had knowingly acquiesced in the use of the discriminatory test, that the employer only continued to utilize the test because of that acquiescence, and that the test perpetuated the effects of earlier intentional union discrimination. Although there was conflicting testimony regarding a number of the subsidiary issues, we believe that substantial evidence supported the decision of the district court imposing liability on the unions.

First, the disputed test perpetuated in a particularly noxious manner the earlier intentional union discrimination. The specific test at issue in this case measured an employee's familiarity with basic tools and machinery. When that test was initially adopted in 1965, it was certain to exclude virtually all blacks seeking promotions, because the union had for years successfully demanded that no black be permitted to hold a skilled position where he or she might have acquired any knowledge of such equipment. The union had further insisted that no black at the plant, regardless of his or her position, should ever be permitted to use any tool whatever. The local union president expressly insisted at a meeting with company officials that "the colored laborers are not supposed to handle

tools", and the union intervened at the behest of white members when several black employees were discovered using hammers and pliers on the job.[5] Thus the practical effect of the post 1965 test was to prevent promotions of the very black workers whom the union had insisted be denied the experience necessary to pass such a test.[6]

Second, the local union deliberately and inexcusably refused to process a grievance challenging the use of the disputed test. In 1970, two blacks who had failed the test submitted a grievance to the union, alleging that the test violated the anti-discrimination provision of the collective bargaining agreement. Successful pursuit of this

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5 Pet. App. 29a; Tr. 204, 210-11; minutes of meeting of March 14, 1956, pp. 2-4.

6 Pet. App. 37a.

grievance would have ended use of the tests long before the filing of the instant action, but the union refused to process it. The district court found:

> The union agreed with the company that [the] grievance was not subject to the grievance procedure.... The union offered no reason ... as to why it did not pursue the grievance on behalf of these black union members.... [T]he court finds that [the black members] were without representation in their grievance seeking to prove that the employer breached the 1968 contract. (Pet. App. 38a-39a).

Union and company representatives discussed the merits of the test at length at a meeting on August 20, 1970, and reached at least a tacit agreement that the test would continue.[7]

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[7] The petition describes this incident as a union "protest" to the company about the test. Pet. 5. The district court found otherwise.

Third, despite repeated objections by black union members to the use of the test, the union refused to ever raise the subject in contract negotiations with the employer. In addition to the aborted 1970 grievance, a black union member complained about the test at a separate meeting during the same year (Pet. App. 58a), and in 1972 another black member on several occasions complained directly about the test to the union's chief negotiator. (Tr. 49a). Although the negotiator promised to "look into" the problem (Tr. 492) the district court found that he never in fact asked the company to change or even reconsider its use of the test. (Pet. App. 58a). In 1975 the Company expressly invited the union to raise with appropriate management officials any objections the union might

have to continued use of the test,[8] but the union thereafter raised no such objection.

If the collective bargaining agreement in this case had expressly approved the use of the illegal test, the union would clearly have been under an obligation to attempt to end the unlawful practice. Nothing in Title VII suggests that such union complicity had to be memorialized in a formal written agreement; the pattern of conduct found by the district court clearly constituted, and communicated to the employer, union endorsement of the disputed test. In this Court petitioners continue to insist otherwise, contending that the union "had not agreed to Clow's use of the test." (Pet. 5). Neither court below, however,

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[8] Minutes of meeting of August 11, 1975.

accepted petitioners' factual contentions, and the fact-bound controversy that lies at the heart of the petition does not warrant review by this Court.

CONCLUSION

For the above reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

OSCAR W. ADAMS, III
Suite 729
Brown Marx Tower
2000 First Avenue, North
Birmingham, Alabama 35203
(205) 324-4445

Counsel for Respondents

ERIC SCHNAPPER
Of Counsel